Supreme Court, U. S.
FILED
JUN 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1780

AMELIA O. BONSUKAN, Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

AMELIA O. BONSUKAN, Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Amelia O. Bonsukan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on April 25, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by a United States District Court, the Court of Appeals having exclusive jurisdiction under 28 United States Code 2341 et seq.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on April 25, 1977. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 United States Code 2350.

QUESTIONS PRESENTED

1. Whether a petition to review filed within six months of a denial of a Motion to Reopen by the Board of Immigration Appeals, which Motion had been filed within six months of the Show Cause hearing, tolls the statutory requirements of Section 106(a)(1) of the Immigration and Nationality Act.

2. Whether the decision of the Court of Appeals which concurred with that of the Board of Immigration Appeals was based on improperly considered factors so as to make the present case a proper one to be remanded for reconsideration.

3. Whether petitioner's Constitutionally granted right to counsel was properly protected by the Immigration and Naturalization Service.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 8

> Section 1105(a)(1) - A petition to review must be filed within six months of a final order of deportation.

Section 1254(a)(1) - The Attorney-General may, in his discretion, suspend the deportation of an alien and adjust his status to that of a permanent resident provided such alien is physically present in the United States for seven years, is of good moral character, and there is a case of extreme hardship to the alien.

Section 1254(f) - Set out in text of Reasons for Granting the Writ.

Section 1182(e) - Set out in text of Reasons for Granting the Writ.

STATEMENT OF THE CASE

Petitioner is a native and citizen of the Republic of the Philippines who was lawfully admitted to the United States as an exchange visitor.

The Course of the Proceedings which brings the matter to this Court is as follows: Petitioner received an Order to Show Cause why she should not be deported on September 19, 1975. At the subsequent hearing, Petitioner's counsel was unable to be present. The Immigration Judge after determining this fact, initially granted a one week postponement of the hearing to allow Counsel to be present. After an interval "off the record", however, Petitioner inexplicably consented to continue with the hearing despite her counsel's absence. Because Petitioner was not represented by counsel at this hearing, none of her proper defenses to the Order to Show Cause were raised nor her right to appeal reserved at this time.

On February 17, 1976 Miss Bonsukan was ordered to be deported. A Motion to Reopen and Reconsider was filed with the Immigration and Naturalization Service on March 3, 1976, and was denied by the same Immigration Judge on April 8, 1976.

An appeal of the Immigration Judge's decision denying the petitioner's motion to reopen was taken to the Board of Immigration Appeals which finally dismissed the appeal on September 30, 1976.

A Petition to Review was filed with the United States Court of Appeals for the First Circuit on October 12, 1976. A decision to dismiss the petition was rendered on April 25, 1977. A petition for modification of the opinion was filed with the Court which entered a memorandum and order on May 18, 1977.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF SECTION 106(a)(1) OF THE IMMIGRATION AND NATIONALITY ACT, 8 UNITED STATES CODE 1105(a)(1).

Section 106(a)(1) of the Immigration and Nationality Act provides that the Petition to Review must be filed not later than six months from the date of the final deportation order. The First Circuit has here held that if petitioner did not appeal the Immigration Judge's decision to the Board of Immigration Appeals within the six month period, her right to petition for review "was

expired and was not revived by the proceedings on the Motion to Reopen."[1] In so holding, the First Circuit conceded that its interpretation of Section 106(a)(1) conflicts with that adopted by the Ninth Circuit in Bregman v. INS, 351 F2d 401 (1965). The Ninth Circuit held that a Petition to Review is allowed if Motion to Reopen was made within six months from date of the deportation order and Petition to Review brought within six months after denial of the motion.[2] This Court in interpreting Section 106(a)(1) of the Act in Woodby v. INS, 385 US 276, 286, note 20 (1966) cited the Bregman decision.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF SECTION 244(f) OF THE IMMIGRATION AND NATIONALITY ACT, 8 UNITED STATES CODE 1254(f).

Section 244(a)(1) of the Act provides that the Attorney-General may, in his discretion, suspend the deportation of an alien and adjust his status to that of a permanent resident provided such alien is physically present in the United States for seven years, is of good moral character and there is a case of extreme hardship to the alien.[3]

Section 244(f) of the Act, however, provides that Section 244(a)(1) is inapplicable to an alien who was admitted to the United States pursuant to Section 101(a)(15)(J) of the Act. Section 101(a)(15)(J) of the Act, 8 USC 1101(a)(15)(J) provides that the term 'immigrant' means every alien except

> "an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide stu-

dent, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training, and the alien spouse and minor children of any such alien if accompanying him or following to join him."

By Section 212(e) of the Act, 8 USC 1182 (e), no person admitted under Section 101(a) (15)(J) who 1) received governmental monetary assistance [4] or 2) was a national or resident of a country listed by the Secretary of State as requiring the services of such person may apply for permanent residence or immigrant visa. This second category was not applied retroactively when the ammendment to the statute was enacted in April, 1970 (75 Stat. 534). It was only applied to aliens who became exchange visitors after the lists were established by the Secretary of State on April 25, 1972.[5] It is evident, therefore, that only an exchange visitor who is subject to the foreign residence requirement is barred from applying for suspension of deportation.[6]

The First Circuit concurred with the Board of Immigration Appeals that the petitioner was ineligible for the remedy of suspension of deportation and in any event the refusal by the Board to grant suspension of deportation was not an abuse of discretion.

In so holding, the First Circuit conceded that its interpretation of Section 244(f) of

the Act conflicts with that adopted by the Ninth Circuit in Siang Ken Wang v. INS, 413 F2d 286 (1969). The Ninth Circuit held in the Wang case that if the

> "Board's decision was based upon the summation of four factors, one of which was improperly considered, this is a proper case for remand for reconsideration by the Board."

In the present case, the decision by the Board of Immigration Appeals that the petitioner was not eligible for the remedy of suspension of deportation is an improperly considered factor together with the factor of the refusal to grant suspension of deportation as a matter of discretion.

3. THE DECISION BELOW RAISES PROBLEMS REGARDING PROPER INTERPRETATION OF THE CONSTITUTIONAL RIGHT TO COUNSEL

The First Circuit held that questions "of unconstitutional denial of counsel and of improperly held hearing should be raised before the immigration judge". "To claim now", the First Circuit decided, "that she was prejudiced by lack of Counsel is altogether too late. Counsel says in his extensive brief that he raised this, and the political matter, post, in his brief before the Board of Immigration Appeals on the appeal from the denial of reconsideration. Even if true, it is elemental that such matters, particularly factual matters, should have been made before the immigration judge and could not be raised for the first time on appeal."

It is the petitioner's contention that questions of denials of counsel and improperly held hearings should be raised at the time the final deportation order was entered according to Section 106(a)(1) of the Act and not necessarily before the immigration judge. In the present case, it is believed that the final deportation order was entered when the Board of Immigration Appeals denied the petitioner's motion to reopen which motion sought to afford an opportunity to apply for the remedy of suspension of deportation under Section 244(a)(1) of the Act.

This Court has stated that the denial of a Motion to Reopen is part of the final deportation order and therefore reviewable by a Court of Appeals.[7]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the First Circuit Court of Appeals.

Respectfully submitted,

Basil S. Yanakakis
Six Beacon Street
Boston, Massachusetts 02108
Counsel for Petitioner

FOOTNOTES

[1]Rosa v. INS, 440F2d 100 (1971). The holding was restated in the present case.

[2]In the case at bar, the record discloses that the deportation order by the immigration judge was issued on October 30, 1975. The petitioner filed a Motion to Reopen on March 3, 1976. The denial of the Motion by the Board of Immigration Appeals was entered on September 30, 1976 and the petitioner filed her petition for judicial review on October 12, 1976.

[3]All these qualifications, it is contended, are met by this petitioner.

[4]This requirement is not applicable to the present petitioner.

[5]This listing is known as the "Exchange-Visitor Skills List", State Department Public Notice 356, 37 Federal Register 8099, (April 25, 1972) and is applicable "only to aliens who obtain exchange visitor visas or status after the effective date of the public notice or of subsequent designations". C. Gordon and H. N. Rosenfield, Immigration Law and Procedure §§ 6.8g, p. 6-56. The present petitioner held exchange visitor status as of 1968.

[6]See Gordon and Rosenfield, §§ 6.8g, pp. 6-57, 6-58 & 7.9c, pp. 7-92, 7-93.

[7]Giova v. Rosenberg, 379 US 18 (1964); Cheng Fan Kwok v. INS, 392 US 206, 217 (1967).

APPENDIX

1. Opinion of United States Court of Appeals for the First Circuit

2. Petitioner's Petition for Modification of Language of Decision

3. Memorandum and Order on Petition for Modification of the Opinion

United States Court of Appeals for the First Circuit

No. 76-1474

AMELIA O. BONSUKAN,
PETITIONER, APPELLANT,
v.
UNITED STATES
IMMIGRATION AND NATURALIZATION SERVICE
and
PATRICK F. COOMEY,
DISTRICT DIRECTOR, INS, BOSTON, MASS.
RESPONDENTS, APPELLEES.

Before
MOORE,* ALDRICH and CAMPBELL, *Circuit Judges.*

Basil S. Yanakakis on brief for petitioner.
Rex Young, Attorney, Department of Justice, with whom *Philip Wilens*, Chief, Government Regulations and Labor Section, Criminal Division, and *James P. Morris*, Attorney, Department of Justice, were on brief, for respondent.

April 25, 1977

ALDRICH, *Senior Circuit Judge.* This is a petition, pursuant to 8 U.S.C. § 1105a, to review a decision of the Board of Immigration Appeals denying petitioner's motion to reopen proceedings which had resulted in an order of deportation. Petitioner, a Philippine national, entered the country in 1968 as a nonimmigrant exchange visitor, 28 U.S.C. § 1101(a)(15)(J), authorized to remain for two years. She stayed beyond that time, but respondents did not press her, apparently because an application for a sixth preference visa, 8 U.S.C. § 1153(a)(6), was approved

* Of the Second Circuit, sitting by designation.

and she was waiting for a visa number. Thereafter, in 1974, it came to respondents' attention that petitioner was no longer employed by the hospital which had filed her sixth preference petition,[1] and deportation proceedings were initiated.

Petitioner attended the deportation hearing, with counsel, but obtained a three weeks continuance for consultation. On the date that had been set petitioner reappeared, but without counsel, stating that she had been unable to locate him. She was offered a further continuance, but, after an off-the-record consultation with someone (other than the immigration judge) she said she would proceed without counsel. At the hearing she then conceded her deportability, and waived appeal. Pausing here, if this was, in fact, an overconcession, it seems extraordinary that in the three weeks continuance granted for conferring with counsel he had left her with the opinion that she had no defense.

Until by reply brief in this court counsel never explained his absence from the hearing. He now says he had a "philanthropic" engagement. If not a dereliction of his obligations, this was, at best, no reason for not informing his client, or an excuse for not notifying the immigration judge, in advance of the hearing. However, it cannot justify the present contention that this irretrievably lost petitioner her right of appeal, which, in turn, lost her her right to review in this court the correctness of the immigration judge's initial order of deportation. *Rosa* v. *INS*, 1 Cir., 1971, 440 F.2d 100; *Gena* v. *INS*, 5 Cir., 1970, 424 F.2d 227. Rather than seeking, at an early opportunity, to right whatever wrong his client could be thought to have suffered because of his absence from

[1] Petitioner had changed jobs, and another sixth preference petition was filed on her behalf by her new employer, which, under the regulations, 8 C.F.R. § 204.6, lost her her place in line and required her to begin anew to wait for a visa number.

the hearing, counsel waited five months and then filed a motion for reconsideration that contained no mention of what is now argued to be an unconstitutional denial of counsel, and an "improperly held hearing." Quite apart from the fact that petitioner appears to be an intelligent woman, who freely refused an offer for a further continuance, to claim now that she was prejudiced by lack of counsel is altogether too late.[2]

Our review, accordingly, is limited to the question whether to deny the petition to reopen and grant a suspension of deportation pursuant to 8 U.S.C. § 1254, was an abuse of discretion. The Board of Immigration Appeals ruled that petitioner had not made a sufficient showing of "extreme hardship," 8 U.S.C. § 1254(a)(1), and, in any event, was ineligible for suspension because she entered the country as an exchange visitor, 8 U.S.C. § 1254(f). We find no abuse on either score. The ruling on hardship was well within the Board's discretion. *Pelaez* v. *INS*, 5 Cir., 1975, 513 F.2d 303, *cert. denied*, 423 U.S. 892; *Kasravi* v. *INS*, 9 Cir., 1968, 400 F.2d 675. Petitioner's claim that the granting of her sixth preference petition "took her out of the exchange visitor status," and hence removed the bar of section 1254(f), is offered without any support in the statute, regulations, or cases.[3] Nor do we find any abuse in the Board's failure to credit

[2] Counsel says in his extensive brief that he raised this, and the political matter, post, in his brief before the Board of Immigration Appeals on the appeal from the denial of reconsideration. The record does not show whether this is so or not. Even if true, it is elemental that such matters, particularly factual matters, should have been made before the immigration judge, and could not be raised for the first time on appeal.

[3] We need not decide whether, under the 1970 amendment to 8 U.S.C. § 1182(e), petitioner is subject to the two year foreign residence requirement before she can obtain a visa, a matter which counsel sought to raise for the first time at oral argument, since section 1254(f) explicitly bars the remedy of suspension of deportation to any exchange visitor. Even if petitioner is not subject to the two year requirement, we could not consider it an abuse for respondents to decline, in their discretion, to allow petitioner to remain in the United States while awaiting a visa. *Bowes* v. *INS*, 9 Cir., 1971, 443 F.2d 30; *United States ex rel. Fen* v. *Esperdy*, 2 Cir., 1970, 423 F.2d 6.

petitioner's claim that she would be subject to political persecution if deported to the Philippines. Petitioner offered no support for this claim in the proceedings below. Her counsel now seeks to excuse this failure with the observation that "the threat of political persecution is difficult to prove," and attempts to establish the case by submission of an affidavit in this court. It is elementary that this attempt comes too late, *see* 8 U.S.C. § 1105a (a)(4), even were we impressed by the showing, which we are not.

This is a wholly meritless petition, and it is only with reluctance that we do not assess respondents' attorney's fees as costs, *NLRB* v. *Smith & Wesson*, 1 Cir., 1970, 424 F.2d 1072, and charge them to petitioner's counsel personally, 28 U.S.C. § 1927.

Petition dismissed.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Amelia O. Bonsukan,	)	
Petitioner, Appellant	)	
v.	)	No. 76-1474
Immigration and Naturalization Service, et al.	)	
Respondents, Appellees	)	

PETITION FOR MODIFICATION OF LANGUAGE
OF DECISION

Petitioner respectfully requests modification of the language of a decision rendered by this Court on April 25, 1977. The Petitioner files this petition with the hope that your Court will change certain language of its decision which may have an adverse effect upon the professional career of her counsel and presents your Petitioner's case as meritless.

The Petitioner believes that her counsel is innocent of any wrongdoing or negligence in handling her case. On the contrary, the Petitioner's counsel always acted with the approval and consent of the Petitioner and after consultations with her. The Petitioner's counsel is a Professor of Law and a lawyer who already has been unfairly hurt by adverse publicity of the Court's decision relating to the counsel's activities (See, Massachusetts Lawyers Weekly, May 2, 1977, p. 7). The Petitioner believes that your Court does not purport to destroy the reputation of innocent counsels who undertake to defend their clients' rights to the best of their ability. This is especially true when such coun-

sels base their case and arguments on decisions of other Federal Courts even if your Court does not accept their findings.

The Petitioner's counsel has helped the Petitioner for three years, successfully representing the Petitioner before the Immigration and Naturalization Service (See, e.g. Sixth-preference petition approved by INS in 1974 through counsel's efforts. See also, Delays of departure granted by the Service to the Petitioner through her counsel's efforts). The Petitioner's counsel represented her with great sacrifice of time and money which so generously he sustained on behalf of your Petitioner (See, Affidavit filed herewith by the Petitioner).

The Petitioner was not given the opportunity before to explain that when she said to the Immigration Judge that she could not locate her attorney she meant that he was not available at that time. She was, however, aware and informed of his whereabouts. The Petitioner may be an intelligent person but before the Immigration Judge she was totally confused and fearful. The possibility that after seven years of productive life in this country she might be deported had an impact upon her performance before the Immigration Judge, which performance may have unjustifiably given the impression that her counsel had derelicted his obligations toward her.

1. Petitioner, therefore, respectfully requests that the language of the decision

> "Pausing here, if this was, in fact, an overconcession, it seems extraordinary that in the three weeks continuance granted for confering with counsel he had left her with the opinion that she had no defense.
>
> Until by reply brief in this court counsel never explained his absence from the hearing. He now says he had a "phil-

> anthropic" engagement. If not a dereliction of his obligations, this was, at best, no excuse for not notifying the immigration judge, in advance of the hearing."

be deleted for the following reasons:

Petitioner was informed that her counsel would be out of town in Washington, D.C. for one week working as Vice-Chairman of AHEPA Educational Foundation. Petitioner was not only notified by her counsel of his impending absence but she fully consented and agreed to his absence and she was requested by her counsel to notify the Immigration Judge that he would be unable to return to Boston in time for the hearing. Also, the member of Congressman O'Neil 's staff who accompanied her to the hearing and who knew the Immigration Judge was also notified. Counsel's understanding was that the Immigration Judge would have granted a short delay until counsel arrived from Washington. This view was based on past practices by the same Immigration Judge who has granted such postponements to Petitioner's counsel and other attornies in similar circumstances. (See, Affidavit submitted by Petitioner.)

2. Petitioner further requests that the paragraph

> "This is a wholly meritless petition, and it is only with great reluctance that we do not assess respondents' attorneys fees as costs, . . . and charge them to petitioner's counsel personally"

be deleted for the following reasons:

Although the Petitioner respects the decision of your Court and is fully aware of our

Constitutional process of government, she does, however, claim that her petition was meritorious for the following reasons:

The Petitioner was hoping that your Court would accept jurisdiction for the Petition to Review, such hope based upon a decision of the Ninth-circuit Court of Appeals case. In the Bregman v. INS case, 351 F2d 401, the Court decided that action for review was timely if the Motion to Reopen was made within six months from the final deportation order and review proceedings were brought within six months from the denial of the Motion to Reopen, as Petitioner's counsel argued in his oral presentation before this Court.

Furthermore, Petitioner was hoping with the Petition for Review to clarify this point since the facts of her case were similar to the Bregman decision. In addition, Petitioner's counsel waited five months before filing a motion for reconsideration because he was instructed by the Petitioner not to proceed for judicial review before an answer be given on a private bill submitted to the Congress on behalf of the Petitioner. (See, Letter of Congressman Joshua Eilberg, Chairman of Subcommittee on Immigration of the United States House of Representatives of February, 1976 and letters of Congressman James Burke of February 27, 1976 and March 18, 1976, all in the record of the proceedings).

Furthermore, the Petitioner believed that the Board of Immigration Appeals did not exercise its discretion when it decided that the Petitioner was ineligible for the remedy of Suspension of Deportation. That was, according to the Petitioner, an erroneous finding. As the ninth-circuit Court of Appeals decided in a similar case; where denial of discretion-

ary relief is predicated on several factors, the inclusion of one improper factor may make the entire determination defective. Wang v. INS, 413 F2d 286 (1969). The Petitioner simply hoped that your Court might take a similar position.

Finally, it was the Petitioner's contention and belief that the Petitioner not only was not subject to the two year residency requirement but also that 8 USC 1254(f) was not applicable in her case. The Petitioner thought that section 1254(f) was not applicable in the Petitioner's case becasue that section bars the remedy of Suspension of Deportation to an exchange visitor who was admitted to the United States pursuant to Title 8 USC 1101(a)(15)(J). But section 1101(a)(15)(J) was not thought applicable in the Petitioner's case because when ammended in 1970 it specifically eliminated cases like Petitioner's from the requirements of the statute. The Petitioner, reading the statute and relying upon an interpretation of the section by Gordon & Rosenfield at section 6.8g at pp. 6-53 to 6-58, concluded with the above-mentioned authors, that section 1254(f) did not bar the remedy of Suspension of Deportation to her, and hoped that your Court would agree with the Petitioner.

Respectfully submitted for
the Petitioner,

/s/
Basil Yanakakis, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1474

AMELIA O. BONSUKAN,
Petitioner, Appellant

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, et al.,
Respondents, Appellees

Before
Moore,* Aldrich and Campbell, Circuit Judges.

MEMORANDUM AND ORDER
on
PETITION FOR MODIFICATION OF THE OPINION

Entered: May 18, 1977

Per Curiam. Petitioner, although strictly it should be petitioner's counsel, since only he is affected by the language complained of, has filed a petition to modify the opinion. We find it difficult to reconcile petitioner's affidavit with the record. It is hard to think that petitioner, who had been in this country, and employed in English speaking hospitals, for seven years, in responding "I can't locate him,"

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*Of the Second Circuit, sitting by designation.

to the question "Is he (your attorney) here?" meant by this, "I know where he is, but he told me he could not come, and for me to tell you." Nor does the affidavit explain the even more important matter, how, after three weeks for investigation, her counsel could have left her with the belief that she had no defense to deportability. Having failed to request a continuance in advance, counsel had no expectation that the proceeding would not go forward in his absence.

The petition for modification is denied, except that we strike the third and fourth sentence from footnote two, and we strike the third and fourth sentences of the paragraph commencing on slip page two (but not the citations) and substitute in place of said two sentences, the following.

"Even if, as now contended on a petition to this court for modification of our opinion, he did inform her, and requested her to inform the immigration judge, she did not do so, though given the opportunity. It was improper procedure, particularly where counsel had obtained one continuance to a date certain, merely to tell his client to appear at the hearing and request another, especially, as is now suggested, she had inadequate command of English. In any event, his excuse cannot justify the present contention that this irretrievably lost her her right of appeal, which, in turn, lost her her right to review in this court the correctness of the immigration judge's initial order of deportation. Chung Chaw Wa v. INS, 1 Cir., 1969, 407 F.2d 854; cf."

By the Court:

/s/ Dana H. Gallup, Clerk